Jamaludin bin Jaafar v Affin Bank Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS K-02–2728–12 OF 2013 AND K-03(IM)(NCVC)-108–08 OF 2014
BALIA YUSOF, BADARIAH SAHAMID AND ABDUL RAHMAN SEBLI JJCA
30 SEPTEMBER 2016

Civil Procedure — Setting aside — Judgment in default — Appellant's application to set aside judgment in default dismissed — Stay of proceedings — Bankruptcy proceedings — Appellant's application to defer creditor's petition pending appeal on application to set aside default judgment dismissed — Appellant appealed against both decisions — Whether learned SAR correct in refusing to postpone hearing of creditor's petition

Land Law — Malay reservations — Charge — Appellant's land registered as Malay reserve land charged to respondent — Whether learned judicial commissioner correct in finding that no contravention of law when Malay reserve land charged to respondent — Kedah Malay Reservations Enactment No 63 s 6

Receiving order ('AORO') arising out of the default judgment given by another SAR which was affirmed by another JC on appeal. In this case, the appellant's land which was registered as Malay reserve land was charged to the respondent and via the default judgment, the trial court found that since the respondent was not a natural person both under the Companies Act 1965 and under the Kedah Malay Reservations Enactment No 63 ('the Kedah Enactment'), the charge was valid for the purpose of the bankruptcy proceedings against the appellant. With regard to the bankruptcy proceedings, the appellant's application to defer the hearing of the creditor's petition until the disposal of the appeal on the application to set aside the default judgment was dismissed by the learned SAR who subsequently made the AORO. The issues for determination in the present appeals were whether the learned JC was right in finding that there was no contravention of the law when the Malay reserve land was charged to the respondent, a non-Malay under the Kedah Enactment; and whether the learned SAR was right in refusing to postpone the hearing of the creditor's petition pending the disposal of the appellant's appeal to set aside the default judgment.

Held, allowing both appeals and setting aside both the judgment in default and the AORO:

(1) The fact that the respondent was a non-Malay was beyond dispute as its name did not appear in the Second Schedule to the Kedah Enactment.

Being not listed in the Second Schedule and therefore a non-Malay, the respondent was prohibited by s 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant (see para 46).

(2) The decision by the learned SAR to issue the AORO which the learned JC affirmed rendered the appellant's appeal on the default judgment completely nugatory, if not purely academic. The effect of the learned SAR's decision was to deny the appellant of his right to pursue his pending appeal before the present court in respect of the default judgment. The decision by the learned SAR was, in the circumstances, a wrong exercise of discretion, thereby giving rise to a miscarriage of justice (see paras 50–51).

[Bahasa Malaysia summary

Terdapat dua rayuan dalam tindakan ini berkenaan keputusan pesuruhjaya kehakiman ('PK') dalam menolak permohonan perayu untuk mengenepikan penghakiman ingkar yang diberikan oleh timbalan pendaftar kanan ('TPK'); dan perintah penghakiman dan perintah penerimaan ('AORO') yang berbangkit daripada penghakiman ingkar yang diberikan oleh TPK lain yang mana disahkan oleh PK lain atas rayuan. Dalam kes ini, tanah perayu yang didaftarkan sebagai tanah rizab Melayu dicajkan kepada responden dan melalui penghakiman ingkar, mahkamah bicara mendapati bahawa memandangkan responden bukan orang biasa di bawah kedua-dua Akta 1965 dan di bawah Enakmen Tanah Rizab Melayu Kedah No 63 ('Enakmen Kedah'), caj adalah sah bagi tujuan prosiding kebankrapan terhadap perayu. Berkaitan prosiding kebankrapan, permohonan perayu untuk menangguhkan pendengaran petisyen pemiutang sehingga pendengaran rayuan atas permohoan untuk mengenepikan penghakiman ingkar ditolak oleh TPK yang bijaksana yang kemudiannya membuat AORO tersebut. Isu-isu untuk penentuan dalam rayuan-rayuan ini adalah sama ada PK yang bijakasana adalah betul dalam mendapati bahawa tidak terdapat pelanggaran terhadap undang-undang apabila tanah rizab Melayu dicaj kepada responden, seorang bukan Melayu di bawah Enakmen Kedah; dan sama ada TPK yang bijaksana adalah betul dalam menolak untuk menangguhkan pendengaran petisyen pemiutang sementara menunggu pendengaran rayuan perayu untuk mengenepikan penghakiman ingkar.

Diputuskan, membenarkan kedua-dua rayuan dan mengenepikan kedua-dua penghakiman ingkar dan AORO:

(1) Fakta bahawa responden adalah bukan Melayu adalah melampaui pertikaian kerana namanya tidak terdapat di dalam Jadual Kedua kepada Enakmen Kedah. Oleh kerana tidak disenaraikan dalam Jadual Kedua dan oleh itu bukan Melayu, responden dilarang oleh s 6 Enakmen Kedah daripada memegang apa-apa hak atau kepentingan, termasuk sebagai

pemegang gadaian, di dalam tanah rizab Melayu yang telah dicajkan kepadanya oleh perayu (lihat perenggan 46).

(2) Keputusan TPK yang bijaksana kepada isu AORO yang mana TPK yang bijaksana sahkan menyebabkan rayuan perayu atas penghakiman ingkar sama sekali tidak berguna, jika tidak semata-mata akademik. Kesan keputusan TPK yang bijaksana adalah untuk menafikan perayu haknya untuk memburu rayuan yang masih belum didengar di hadapan mahkamah ini berkaitan penghakiman ingkar. Keputusan oleh TPK yang bijaksana adalah, dalam keadaan, pelaksanaan salah budi bicara, dengan itu membangkitkan ketidakadilan (lihat perenggan 50–51).]

Notes

For a case on charge, see 7(3) *Mallal's Digest* (5th Ed, 2015) para 4019.
For cases on judgment in default, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8312–8317.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Ho Giok Chay v Nik Aishah [1961] 1 MLJ 49 (refd)
R v Duke [1985] 6 WWR 386, CA (refd)
RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors [1980] 1 MLJ 248 (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
Sime Bank v Tetuan Projek Kota Langkawi Sdn Bhd [1998] 4 MLJ 334; [1999] 1 CLJ 307, HC (not folld)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Canadian Criminal Code [CN]
Companies Act 1965
Kelantan Malay Reservations Enactment 1930 s 7
Kedah Enactment No 63 (Malay Reservations) ss 2, 6, 6(1), (2), 7, 19, Second Schedule, Schedule A
Malay Reservation Enactment (FMS Cap 142)
Rules of Court 2012 O 19 r 9

Appeal from: Bankruptcy No 29NCVC-1541–07 of 2012 (High Court, Alor Setar)

P Latsmanan (Khor Gaik Thiam & Latsmanan) for the appellant.
Ong Bee Khoon (Lim Poh Leong with him) (Gibb & Co) for the respondent.

Abdul Rahman Sebli JCA:

[1] There were two appeals before us. The first was against the dismissal by Zakiah Kassim JC of the appellant's appeal against the decision of the learned senior assistant registrar ('SAR') on 12 September 2013 who rejected the appellant's application to set aside the default judgment entered against him on 16 October 2011.

[2] The second appeal was against the dismissal by Abu Bakar Katar JC of the appellant's appeal against the decision of the same SAR who made an adjudication order and receiving order ('the AORO') against the appellant on 26 February 2014. The AORO arose directly from the default judgment entered against the appellant on 16 October 2011. The judgment creditor in the bankruptcy matter was Affin Bank Bhd, the respondent in these appeals ('Affin Bank').

[3] Having heard arguments from both sides, we allowed both appeals by a unanimous decision and set aside both the judgment in default and the AORO. We now provide the grounds for our decision.

[4] The material facts giving rise to these appeals are as follows. On 16 October 2011 vide Alor Setar High Court Civil Suit No 22–189–06 of 2011, Affin Bank obtained judgment in default against the appellant whereby the appellant was ordered to pay Affin Bank a sum of RM998,527.86 with interest at the rate of 3.5%pa calculated on a monthly basis from 1 April 2012 until full payment.

[5] On 16 July 2012 Affin Bank filed a bankruptcy notice against the appellant, followed by a creditor's petition six months later on 22 February 2013. The appellant opposed the petition and had duly served on Affin Bank his notice of intention to oppose the petition. In the meantime, the appellant filed a summons in chambers seeking for an order that the hearing of the creditor's petition be stayed pending disposal of his application to set aside the default judgment. The application was granted by the learned SAR on 22 May 2013.

[6] The appellant's application to set aside the default judgment was heard and dismissed by the learned SAR on 12 September 2013. The appellant appealed to the judge in chambers against the decision but was dismissed by Zakiah Kassim JC on 13 November 2013. The judgment in default therefore remained in force.

[7] Dissatisfied with the decision, the appellant filed an appeal to this court and the appeal was registered as Civil Appeal No K-02–2728–12 of 2013 and

the memorandum of appeal had been filed. The appellant had also filed the appeal record, the additional appeal record, the additional appeal record (2) and the additional appeal record (3). The appeal was fixed for hearing on 14 July 2015.

[8] The main ground of appeal raised by the appellant in the memorandum of appeal was that the default judgment ought to be set aside as the third party charge registered in favour of Affin Bank as security for the loan granted to one Teh Two Kea trading under the style and name of Leong Hin Company was null and void as Affin Bank is not a 'Malay' within the meaning of s 2 of the Kedah Malay Reservations Enactment No 63 ('the Kedah Enactment'). The appellant himself is a Malay and the land that he charged to Affin Bank is categorised as Malay reservation land.

[9] The other ground relied upon by the appellant was that the court had no jurisdiction to make any order against him for the reason that he was neither the guarantor nor party to the facilities agreement between Affin Bank and the borrower, and that further he had gained no benefit from the agreement. In short the appellant's case was that he had a defence on the merits and for that reason the judgment in default ought to be set aside.

[10] The law is trite that a defence on the merits is a ground for setting aside a judgment entered by default. Despite the pending appeal before this court, which on the face of it contained grounds which merited consideration, the learned SAR fixed the creditor's petition for hearing on 13 January 2014. Learned counsel for the appellant applied for a deferment of the hearing pending disposal of the appellant's appeal to this court on the default judgment but the learned SAR refused to entertain the application. Instead she fixed 26 February 2014 as the final date for hearing of the petition.

[11] On the hearing date, ie on 26 February 2014 learned counsel for the appellant again applied for the hearing of the creditor's petition to be deferred until after the appellant's appeal to this court against the default judgment had been disposed of. Learned counsel for Affin Bank objected to the application on the ground that the appellant's application to set aside the default judgment had been rejected by the learned SAR and the decision had been affirmed by Zakiah Kassim JC.

[12] The learned SAR acceded to Affin Bank's objection and proceeded to hear the creditor's petition at the conclusion of which she made the impugned AORO. The appellant appealed to the judge in chambers against the decision but was dismissed by Abu Bakar Katar JC on 11 August 2014. With this decision, there were now two orders subsisting side by side against the appellant, first the judgment in default dated 16 October 2011 and second the

AORO dated 26 February 2014. These were the subject matters of the two appeals before us.

[13] We shall deal with the appeal against the decision of Zakiah Kassim JC first, not only because it was first in time to be filed but also because if we were to allow the appeal and set aside the default judgment, the decision of Abu Bakar Katar JC affirming the decision of the learned SAR to issue the AORO would have to be set aside as a sequitur because with the setting aside of the default judgment, the whole substratum of the AORO on which the decision was based would no longer be in existence.

[14] Under O 19 r 9 of the Rules of Court 2012, the courts have the discretion to set aside or vary any default judgment. The appellant's argument is that the learned SAR had exercised the discretion wrongly against him and that the learned JC perpetuated the error by affirming the decision and in finding that he had failed to show a defence on the merits.

[15] The reason given by Zakiah Kassim JC for affirming the learned SAR's decision was that the learned SAR committed no error in exercising her discretion not to allow the appellant's application to set aside the default judgment, citing *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217.

[16] Learned counsel for Affin Bank urged upon us to dismiss the appeal as both the learned SAR and the learned JC were right in finding that the appellant had not shown a defence on the merits. It was argued that the third party charge was valid as the question is not whether the land that the appellant charged to Affin Bank is a Malay reservation land but whether the land could be charged to a company that is not a Malay.

[17] The correct approach to be adopted by an appellate court in dealing with the exercise of discretion by a lower court has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 in the following terms at p 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion *(Charles Osenton & Co v Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam*).

[18] There are therefore two situations where the exercise of the discretion can be assailed on appeal:

(a) where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) where there has been a miscarriage of justice occasioned by the exercise of the discretion.

[19] Either situation would entitle the aggrieved party to a reversal of the decision on appeal. It is important to appreciate that in the present case the discretion was vested in the learned SAR and not in the learned JC whose role was merely to affirm or reverse the exercise of that discretion by the learned SAR although she was hearing the matter afresh, being an appeal to the judge in chambers.

[20] The question that called for our consideration was whether the learned SAR had exercised her discretion properly when she rejected the appellant's application to set aside the default judgment. More specifically the question was whether she had sufficiently applied her mind to the question of whether the appellant had shown a defence on the merits, granted that the judgment in default was obtained regularly.

[21] It needs no emphasis that a judicial discretion is a discretion that is to be exercised judiciously, not at a whim or fancy. It is an exercise that involves weighing up all sides and taking into account opposing points of view, separating the wheat from the chaff. It is a rational, sober, sound, sagacious and considered decision. It is never a split-second decision, much less a decision that is made on the spur of the moment in the heat of argument and without getting the facts right.

[22] As we mentioned, the learned JC's finding was that the learned SAR had exercised her discretion correctly in rejecting the appellant's application to set aside the default judgment. There is nothing wrong with this approach but our reservation is with the learned JC's failure to sufficiently consider whether the decision by the learned SAR had given rise to a miscarriage of justice.

[23] In the context of a judicial proceeding both civil and criminal, the term 'miscarriage of justice' refers to a judicial act that is clearly mistaken, unfair or improper. A miscarriage of justice arises when the mistaken, unfair or improper judicial act results in prejudice or injustice to the party affected by the decision. A familiar example is where a man is convicted of an offence he did not commit or, in the context of a civil suit, a party is found liable for a civil wrong he is not responsible for.

[24] Proof of actual prejudice resulting from an error of law is not a prerequisite to a finding that a miscarriage of justice has occurred. In this

regard, we should perhaps reproduce what Justice McClung of the Alberta Court of Appeal wrote in *R v Duke* [1985] 6 WWR 386 in reference to an appeal on the Canadian Criminal Code, as follows:

> ... the determination of whether a *miscarriage of justice* has occurred rests on broader considerations than those attaching to the demonstration of a *substantial wrong*. Proof of actual prejudice resulting from an error of law is not requisite to a finding that a *miscarriage of justice* has occurred. It may be enough that an appearance of unfairness exists.

[25] We do not have the benefit of the grounds of decision by the learned SAR but going by the learned JC's reasoning and the submissions of the parties both before us and in the court below, it appears that the rejection by the learned SAR of the appellant's application to set aside the default judgment was based on the ground that since Affin Bank is a not a natural person both under the Companies Act 1965 and under the Kedah Enactment, the third party charge registered in favour of Affin Bank was not in breach of any law and therefore valid for purposes of the bankruptcy proceedings against the appellant.

[26] The learned JC correctly identified this issue as being determinative of the appellant's application to set aside the default judgment. The question therefore is whether she was right in finding that there was no contravention of the law when the Malay reservation land was charged to Affin Bank, a non-Malay under the Kedah Enactment. If the appellant was right on this point, then it must follow that the learned SAR and the learned JC were both wrong in refusing to set aside the default judgment.

[27] In arriving at her decision the learned JC relied heavily on the judgment of Hishamudin Yunus J (as he then was) delivered 17 years ago in *Sime Bank v Tetuan Projek Kota Langkawi Sdn Bhd* [1998] 4 MLJ 334; [1999] 1 CLJ 307. Two things must be kept in mind when considering this case. Firstly, the charged land was a Malay reservation land and secondly, the chargee bank (Sime Bank) was a non-Malay within the meaning of s 2 of the Kedah Enactment.

[28] The issue in that case, like the issue before us, was whether under s 6 of the Kedah Enactment, a Malay reservation land could be charged to the plaintiff bank, a non-Malay. While acknowledging that the object of the Kedah Enactment was to protect Malay rights by preventing reservation lands from falling into the hands of non-Malays, the learned judge nevertheless went on to hold:

> (a) under the State of Kedah Malay Reservation Enactment, the Plaintiff, although being a company and therefore not a Malay as defined by the Enactment, is allowed

to be a chargee in respect of a Malay reservation land.

[29] From our reading of the judgment, the sheet anchor of the learned judge's reasoning was that since the word 'Malay' in s 2 of the Kedah Enactment only refers to natural persons and not to nonnatural persons, the plaintiff bank being a non-natural person was neither Malay nor non-Malay and as such was not caught by s 6 of the Kedah Enactment which prohibits a non-Malay from holding any right or interest in any Malay reservation land. The word 'Malay' is defined by s 2 to mean:

> a person professing the Muslim religion and habitually speaking the Malay language of whose parents one at least is a person of Malayan race or of Arab descent.

[30] The effect of Hishamudin Yunus J's decision is that a Malay reservation land in Kedah could be charged to any non-natural person such as a commercial bank or a licensed 'Along' operating as a private limited company irrespective of whether such non-natural person is a Malay or otherwise within the meaning of s 2 read with the Second Schedule to the Kedah Enactment.

[31] With all due respect to the learned judge, we must say at the outset that we are unable to accept his reasoning as a correct proposition of law. To give s 6 of the Kedah Enactment the construction that the learned judge had given would be to give a construction that would defeat the object of the provision rather than to put its object into effect.

[32] The issue before His Lordship was a straightforward issue of whether any right or interest in any Malay reservation land could vest in a non-Malay. The answer to the question is self evident in s 6 itself, which we reproduce below for ease of reference:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[33] Subsection (2) above is clear and unambiguous, that any document or agreement purporting to vest in a non-Malay any right or interest in any Malay reservation land 'shall be void'. So strict is the prohibition that even an attempt at such act by a Malay is threatened by s 7 with forfeiture of his land, which 'shall thereafter vest in the Sultan absolutely'.

[34] The operative words in sub-s (1) are 'no right or interest therein shall vest ... in any person who is not a Malay' which having regard to the legislative scheme of the Kedah Enactment must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee.

[35] As the plaintiff bank in that case was a non-Malay, the vesting in the bank of interest in the Malay reservation land in question by way of the third party charge was therefore null and void and of no effect. The fact that the plaintiff bank was a non-natural person was irrelevant because under the Kedah Enactment a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay.

[36] Even the Malayan Borneo Building Society is a 'Malay' under the Kedah Enactment although obviously it is a not a natural person (see the Second Schedule). The long list of non-natural persons in the Second Schedule dispels any notion that only natural persons can qualify as 'Malay' under the Enactment.

[37] The flaw in the learned judge's reasoning is that it did not read into s 6 the provisions of s 19 read together with the Second Schedule to the Kedah Enactment. If he had, His Lordship would have realised that although Sime Bank, the plaintiff in that case, was a nonnatural person, it would have qualified as a 'Malay' under the Enactment had it been declared as a Malay by the Ruler-in-Council pursuant to s 19, which provides as follows:

> 19 Power to declare other person to be Malay.
>
> The Ruler-in-Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term 'Malay' wherever it shall occur in this Enactment or in any amendment or re-enactment thereof.

[38] Thus, the reason why Sime Bank was not a 'Malay' within the meaning of s 2 of the Kedah Enactment was not because it was not a natural person as opined by the learned judge but because it had never been declared as a Malay by the Ruler-in-Council pursuant to s 19. In the circumstances, we are constrained to hold that *Sime Bank* was decided *per incuriam* and can no longer be regarded as good law in so far as it ruled that a Malay reservation land could be charged to a non-Malay.

[39] In *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248, a case which the learned judge followed, Syed Agil Barakbah J (as he then was) by way of obiter held the following view at p 251:

> In the second paragraph of the Schedule it is stated that all documents of title except permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the (Kedah) Enactment allows reservation land to be charged to a non-Malay.

[40] The second paragraph of the Schedule that Syed Agil Barakbah J referred to in the above passage is in fact the third paragraph of Schedule A to the Kedah Enactment which reads:

> All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

[41] There seems to be a conflict between this paragraph and s 6(2) of the Kedah Enactment. This paragraph says that documents of title may be charged to 'anyone' (which necessarily includes a non-Malay) except that the land may be sold only to a Malay if the chargor does not pay the money due, whereas s 6(2) says that the vesting of any such 'right' or 'interest' in a non-Malay 'shall be void'.

[42] The view that we take on this apparent legislative discrepancy is that although Schedule A is part and parcel of the Kedah Enactment and must not therefore be ignored, it cannot override the substantive provision that governs the legality or otherwise of the act of vesting in a non-Malay any right or interest in any Malay reservation land, and that provision is s 6 of the Kedah Enactment. In fact the last paragraph of the Schedule that Syed Agil Barakbah J referred to in *RAP Nathan* contains the following endorsement:

> This notice is *published for information* only and shall not be deemed to vary the provisions of this Enactment. (Emphasis added.)

[43] In our view, the correct position of the law on the subject is the dictum of Hepworth J in *Ho Giok Chay v Nik Aishah* [1961] 1 MLJ 49 where the learned judge said at p 53:

> In my opinion, therefore, the charges with which we are concerned constitute a breach of the provisions of subsection (i) of section 7 of the Reservations Enactment. That being so, by virtue of the provisions of sub-section (i) of section 12 of that Enactment these charges are null and void.

[44] We are mindful of the fact that the decision was made in the context of s 7 of the then Kelantan Malay Reservations Enactment 1930 which admittedly is not similar word for word with the wordings of s 6 of the Kedah Enactment but that in our view is of no consequence because the pith and

substance of both provisions is to prohibit any Malay reservation land from being vested in any person not being a Malay. We hasten to add that it is not for the courts to question the wisdom behind these legislations.

[45] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 the Federal Court was dealing primarily with the issues of *res judicata* and the inherent power of a court of unlimited jurisdiction to set aside its orders made in breach of written law but the following observations by Gopal Sri Ram JCA (as he then was) in dealing with the scope and extent of the protection given by the Malay Reservation Enactment (FMS Cap 142) are illuminative. This is what His Lordship said:

> What became void in consequence of the breach of the Enactment was the charge that the appellants had created over the land. With it fell the annexure that contained the contract between the appellants and the respondent. The contract of loan between Ismail and the respondent continued to be perfectly valid since it did not offend the provisions of the Enactment. But no benefit whatsoever passed from the respondent to the appellants under either contract. The appellants were not parties to the loan agreement. Neither did they receive any benefit under the annexure to the charge. Indeed, what they suffered was a detriment because they put their property at risk.

[46] Back to the present appeal, the fact that Affin Bank is a non-Malay is beyond dispute as its name does not appear in the Second Schedule to the Kedah Enactment. There are presently only two banks listed in the Second Schedule, namely Bank Bumiputra Malaysia Bhd and Bank Pertanian Malaysia Bhd. Being not listed in the Second Schedule and therefore a non-Malay, Affin Bank is prohibited by s 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant.

[47] It was for these reasons that we allowed the appellant's appeal against the decision of Zakiah Kassim JC and set aside the default judgment. We indicated that the outcome of this appeal would determine the outcome of the appeal against the decision by Abu Bakar Katar JC on the AORO. For completeness however, we feel obliged to touch briefly on the appellant's appeal against the decision.

[48] Only one issue was raised by the appellant before the learned JC, and that is whether the learned SAR was right in refusing to postpone the hearing of the creditor's petition pending disposal of his appeal to this court to set aside the default judgment.

[49] The main thrust of the appellant's argument was that the learned SAR's decision to proceed with the hearing of the creditor's petition despite knowing

that there was an appeal pending before this Court to set aside the default judgment was a travesty of justice in that the AORO effectively denied him of his right to pursue his appeal against the decision of Zakiah Kassim JC in affirming the learned SAR's decision on the default judgment.

[50] We were inclined to agree with the appellant because for all practical purposes, the decision by the learned SAR to issue the AORO which the learned JC affirmed rendered the appellant's appeal on the default judgment completely nugatory, if not purely academic.

[51] There can be no argument that the effect of the learned SAR's decision was to deny the appellant of his right to pursue his pending appeal before this court in respect of the default judgment. The decision by the learned SAR was, in the circumstances, a wrong exercise of discretion, thereby giving rise to a miscarriage of justice in the sense we have explained earlier in this judgment. The AORO must therefore be set aside.

Appeals allowed; judgment in default and AORO set aside.

Reported by Dzulqarnain Ab Fatar